IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

WEDNESDAY, THE 12TH SEPTEMBER 2007 / 21ST BHADRA 1929

WP(C).No. 11566 of 2007(B)

PETITIONERS:

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1. K.P.AYISHA, W/O M.P.ABDULLA HAJI,
   AGED 41 YEARS, COMPY PONNANKOD HOUSE,
   P.O.PARAKKADAVU, KOZHIKODE.

2. M.P.ABDULLA HAJI,
   COMPY PONNANKOD HOUSE, P.O.PARAKKADAVU,
   KOZHIKODE.

BY ADV. SRI.K.ABDUL JAWAD

RESPONDENTS:

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1. THALASSERY MUNICIPALITY,
   REPRESENTED BY ITS SECRETARY,
   THALASSERY.

2. SECRETARY,
   THALASSERY MUNICIPALITY,
   THALASSERY.

3. PLANNING COMMITTEE,
   REPRESENTED BY ITS CHAIRMAN,
   THALASSERY MUNICIPALITY,
   THALASSERY.

BY ADV. SRI.I.V.PRAMOD

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 12/09/2007 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE,J.

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W.P.(C) No.11566 of 2007

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Dated: 12th September, 2007

JUDGMENT

A detailed counter affidavit has been filed on behalf of the 2nd respondent, the Secretary of the Thalassery Municipality to which a reply affidavit has been filed by the petitioner. Very extensive submissions were addressed before me by Mr.K.Abdul Jawad, counsel for the petitioners and Mr.I.V.Promod, counsel for the 2nd respondent-Municipality.

2. The impugned order is Ext.P2 in which three reasons are mentioned for rejecting the application submitted by the petitioners. I shall deal with reason No.2 first. As per this reason, the proposed construction violates Table 5 under Rule 34(2), Chapter IV of the Kerala Municipality Building Rules in that as against the requirement of facility for parking 22 cars, the plan provides facility for parking only 18 cars. A careful perusal of Table 5 under Rule 34(2) which provides for the mandatory parking area for various types of occupancies that as per the relevant entry 7, for Group F-Mercantile/Commercial building exceeding 75 sq. metres carpet area, what is required is facility for parking one car per 100 sq. metres of carpet area. Going by the documents produced and the pleadings

raised, the total carpet area of the proposed construction is only 17.61 sq. metres which means that it is sufficient if facility for parking 18 cars is provided. It is seen that the petitioners have actually provided facility for parking 18 cars. So the second reason mentioned in Ext.P2, according to me, cannot be a valid reason. The firsts reason is that the plan submitted by the petitioner violates Rule 31(1) of K.M.B.R. and the third reason is that the plan violates Rule 34(6). But it will be seen that both these reasons are founded on the basis that a portion of the property belonging to the petitioner having roughly an extent of six and odd cents has to be excluded from the reckoning on the ground that the said portion is to be utilised as per an existing D.T.P.Scheme which came into force on the strength of the Government Order, G.O.(Ms) No.70/88/LAD dated 27.5.1988 for road widening. In fact the relevant contention is seen raised in paragraph 3 of the counter affidavit is as follows:

"It is true that some portion of the land proposed for construction is falling in the land through which the proposed road, as per D.T.P.Scheme, is passing. The petitioners submitted applications for construction leaving the portion of land coming in the proposed road portion. The D.T.P.Scheme came into force on the strength of

G.O.(Ms) 70/88/LAD dt. 27.5.88 and is in force upto 2008, i.e., from 20 years from the date of commencement as per section 20 of Madras Town Planning Act."

It is not disputed that during the past 19 years during which the D.T.P.Scheme in question has been in currency, no concrete steps have been taken by the Corporation for acquiring any portion of the petitioners property for the purpose of road widening. The Scheme will expire even as per Section 20 of the Madras Town Planning Act by 27.5.2008. Having regard to the principles laid down by the Supreme Court in **Raju S.Jethmalani v. State of Maharashtra** [(2005) 11 S.C.C. 222] and the judgments of this court in **Padmini v. State of Kerala** (1999 (3) KLT 465) as well as **Francis v. Chalakudy Municipality** (1999(3) KLT 560), in my opinion, the Municipality is not justified in insisting that the petitioner shall not utilise his property to the maximum extent possible and in the most advantageous manner on the reason that a D.T.P.Scheme which has not been acted upon 19 years since its commencement is in operation.

3. I set aside the impugned order and direct the Municipality to pass fresh orders ignoring the three reasons which are mentioned in

Ext.P2. If the plan submitted by the petitioner is otherwise in order, the Municipality will approve the same and grant building permit to the petitioner. But it is made clear that in case the Municipality initiate proceedings for acquisition of any portion of the petitioner's property by promulgating notification under Section 4(1) of the Land Acquisition Act on or before 25.5.2008, the petitioner will not be entitled for any compensation under the Land Acquisition Act for the building to be constructed on the strength of the permit.

The Writ Petition is allowed to the extent indicated above.

srd **PIUS C.KURIAKOSE, JUDGE**